ORIGINAL NO. 87-6987

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

WILLIAM ANTHONY LIPHAM,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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SUPREME COURT, U. S.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should this Court consider the Eighth Amendment issue of the propriety of the prosecutor's argument, which Petitioner contends diminished the jury's responsibility as sentencer, as this issue was not raised below?

II.

Should this Court review the issue of whether the sentencing jury allegedly failed to 'consider' evidence in mitigation as this issue was not raised below?

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PART ONE
STATEMENT OF THE CASE

Petitioner, William Anthony Lipham, was indicted in Coweta County, Georgia, during the 1986 March Term for the offenses of murder, rape, armed robbery and burglary. (R. 22). Upon a trial by jury, Petitioner was found guilty of the four charges on February 11, 1987. (R. 192). On February 12, 1987, the jury found the existence of four statutory aggravating circumstances and recommended a sentence of death. (R. 201, 203). Specifically, the jury found the existence of three statutory aggravating circumstances under O.C.G.A. § 17-10-30(b)(2), finding Petitioner committed the murder while he was engaged in the commission of the offenses of rape, armed robbery and burglary. The jury also found the existence of the O.C.G.A. § 17-10-30(b)(7) statutory aggravating circumstance, finding that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of

mind. Pursuant to the jury's binding recommendation as to sentence, the trial court sentenced Petitioner to death for murder; the court sentenced Petitioner to life imprisonment for rape, to life imprisonment for armed robbery, and to twenty years imprisonment for the burglary, all sentences to be served consecutively to each other. (R. 203-205).

On direct appeal, the Supreme Court of Georgia affirmed Petitioner's convictions and sentences. Lipham v. State, 257 Ga. 808, ___ S.E.2d ___ (1988). The court specifically affirmed the existence of the three O.C.G.A. § 17-10-30(b)(2) statutory aggravating circumstances but noted that the (b)(7) circumstance should have been returned in the conjunctive rather than the jury's disjunctive finding of torture or depravity of mind. Id. The court affirmed the death sentence on the basis of the remaining statutory aggravating circumstances. Id.

Petitioner now seeks review of the decision of the Supreme Court of Georgia by raising federal constitutional issues which were not presented to nor decided by the state appellate court.

PART TWO

STATEMENT OF THE FACTS

On the afternoon of December 4, 1984, Mrs. Pat Furlow visited the home of her seventy-nine year old mother-in-law, Mrs. Kate Furlow. (T. 146-149). Mrs. Pat Furlow visited her mother-in-law on a regular basis and at trial testified that her mother-in-law was in good health on December 4, 1984, and that her house was neat as usual. (T. 146-149). Mrs. Furlow left the victim's home later that evening. (T. 149).

On the following day, December 5, 1985, family members were unable to get in touch with Mrs. Kate Furlow by telephone. (T. 158-160). Mrs. Furlow's son, Charles Furlow, Jr., became concerned and went to his mother's

home. (T. 161). When Mr. Furlow arrived at his mother's home he discovered a broken window in her front door and did not hear the victim's dog barking. (T. 161). Mrs. Furlow always kept her doors locked when she was in the house alone and her small dog continuously barked when any strangers were around the house. (T. 153, 154). Mr. Furlow looked inside the house and discovered that it had been ransacked. (T. 161). Mr. Furlow left his mother's home and immediately called the police. (T. 162).

The police arrived at Mrs. Furlow's home and discovered Mrs. Furlow in her bedroom with a contact gunshot wound to her head. (T. 228-233). The victim's body was discovered bent over her bed with her legs spread and her body disrobed from the chest down. (T. 232-233). In addition to the house being ransacked the authorities discovered food out on the kitchen table. (T. 233-234).

A neighbor of the victim, Mrs. Sybil Laurent, informed the authorities that at approximately 12:30 p.m. on the morning of December 5, 1985, she had discovered someone standing in her kitchen. (T. 170, 171). Mrs. Laurent testified that she had gone to bed but had gotten back up in response to her dog's barking. (T. 169, 170). Mrs. Laurent stated that she questioned the individual as to what he wanted and the person kept asking for someone by the name of Ronnie. (T. 171, 172). Mrs. Laurent's son then came into the kitchen and asked the individual to leave at which point the person did leave Mrs. Laurent's house. (T. 172). Mrs. Laurent then helped the authorities prepare a composite drawing which was later identified to the authorities as being the Petitioner. (T. 236). At trial Mrs. Laurent identified the Petitioner as the individual who had been in her home on that morning. (T. 174-177). Mrs. Laurent also testified that the Petitioner, when he was in her kitchen, had

consistently ignored her questions but had left when her son had appeared in the kitchen and asked the Petitioner to leave. (T. 177-178).

The authorities subsequently obtained a .25 caliber automatic pistol from the Petitioner's brother which was transported to the State Crime Lab. (T. 237, 238). The Petitioner was arrested by the authorities in Douglasville, Georgia, on January 14, 1986. (T. 239). The Petitioner gave a statement to authorities in which he admitted burglarizing the victim's home but stated that another individual who had been with him at the time was responsible for the rape and murder of the victim. (T. 249-282). The Petitioner specifically informed the authorities that on the evening of December 5, 1985, he had left a friend's house to hitchhike to Savannah, Georgia, to look for a job. (T. 250, 251). The Petitioner stated that he had stopped at the home of Mrs. Laurent but that he was attempting to call a friend of his, a Mr. Ronnie Simon. (T. 250). Petitioner stated that he then left Mrs. Laurent's house and went back to the highway to hitchhike. (T. 251). At that point, an individual picked him up and asked him if he was interested in making some quick money. (T. 251). The Petitioner and the individual then went to the victim's home, and the other individual broke in through the front door. (T. 251). The Petitioner admitted that he then went through the housed ransacking it and looking for items to steal and stated that while he was in the course of eating some food in the kitchen he heard a gunshot in the bedroom. (T. 252). Petitioner testified that the other individual then came out of the bedroom, killed the victim's dog and that both he and the other individual then left the house. (T. 252). Petitioner testified that the other individual then gave him a .25 caliber automatic and told him that "I didn't use this one." (T. 255). The

Petitioner admitted taking a ring and some coins from the victim's house. (T. 253). The Petitioner further admitted pawning the ring and the coins and then leaving the state to go to Florida. (T. 255-257). In his statement the Petitioner did not identify the other individual who was allegedly involved. (T. 282).

Mr. Ronnie Simon testified that the Petitioner, on the night of December 4, 1985, had come by his trailer and had asked Mr. Simon to drive him around to look for two black individuals in a Lincoln automobile. (T. 189-191). While driving around the Petitioner had asked Mr. Simon to drop him off at a point near the victim's home. (T. 192). Mr. Simon then dropped the Petitioner off and later saw the Petitioner on the morning of December 5, 1985, and that at that time the Petitioner had with him some coins and some jewelry. (T. 195). The Petitioner also had with him a .25 caliber automatic pistol which the Petitioner generally carried most of the time. (T. 195-197).

A Ms. Susan Hardy, who lived with Ronnie Simon, testified that early on the morning of December 5, 1985, she saw the Petitioner in Mr. Simon's trailer. (T. 204-207). At that time, th Petitioner had a small bag with him which contained some change, some costume jewelry and a gun. (T. 208). Ms. Hardy testified that the Petitioner stated, "Not bad for a night's work or less than an hour." (T. 208).

An autopsy performed on the victim disclosed that the victim had suffered a pressed contact wound to the left temple. (T. 285-286). The bullet had traveled through the victim's brain from left to right and the victim had died as a result of the gunshot wound. (T. 287). The autopsy also disclosed a large amount of fluid in the victim's vagina; however, the fluid was not positively identified as being seminal fluid. (T. 288-292). The medical examiner did testify at trial, however, that he

believed that the victim had been engaged in intercourse based upon the large amount of fluid in the vagina, the position of the victim's body and the fact that the victim's panties and pajama bottoms were around her left ankle at the time of her death. (T. 288-292).

The State Crime Lab also determined that a pubic hair found on the victim was consistent with the Petitioner's pubic hair. (T. 302-304). The Crime Lab also determined that the bullet which had killed the victim had been fired from the Petitioner's .25 caliber automatic pistol and that a cartridge found on the victim's bed had also been ejected from the Petitioner's gun. (T. 333-336).

Prior to leaving the state after the murder, the Petitioner had in fact attempted to pawn a ring and coins which he had taken from the victim's home. (T. 151, 152, 182, 183, 217-221). The state also established that after the murder the Petitioner attempted to sell the .25 caliber automatic pistol used to kill the victim. (T. 223-226).

The Petitioner took the stand in his own defense and testified consistent with the prior statement which he had given authorities. However, the Petitioner testified at trial that the individual who had actually raped and killed the victim was a Mr. Ricky McCoon. (T. 360-372). The Petitioner testified that on the afternoon of December 4, 1985, he had met Mr. McCoon at a bar in LaGrange and that he and Mr. McCoon discussed going to Savannah that night for the purpose of finding jobs. (T. 360, 361). The Petitioner then met Mr. McCoon later that night at a highway near the victim's house, after being dropped off by Mr. Ronnie Simon. (T. 361-365). The Petitioner and Mr. McCoon then discussed breaking into some homes in order to get money to live on while they were in Savannah looking for a job. (T. 367). After first attempting to break into the home of Mrs. Laurent, the Petitioner

testified that he and Mr. McCoon went to the victim's house and at that point Mr. McCoon broke in through the front door. (T. 369). Petitioner testified that Mr. McCoon assaulted the victim and that he, the Petitioner, went through the house looking for items to steal. (T. 369, 370). Petitioner testified that Mr. McCoon then shot the victim and stabbed her dog and that he and Mr. McCoon left the house and that he, the Petitioner, went back to Ron Simon's trailer. (T. 372-374). The Petitioner tesified that he had not informed the authorities of Mr. McCoon's identity because it was his belief that Mr. McCoon had been murdered and he thought the authorities would blame him for Mr. McCoon's murder. (T. 376-379).

On February 11, 1987, the jury found the defendant guilty of murder, rape, armed robbery and burglary. (T. 467, 468). Following a sentencing hearing the jury recommended a sentence of death, finding beyond a reasonable doubt that the offense of murder had been committed in the commission of the rape of the victim, that the murder had been committed while the Petitioner was engaged in the commission of armed robbery, that the murder had been committed while the Petitioner was engaged in the commission of the burglarly of the home of the victim and that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on the part of the Petitioner. (T. 542, 543). The trial court, on February 12, 1987, sentenced the Petitioner to death for the murder, to life in prison for the charge of rape, to life in prison for the charge of armed robbery, and to twenty years in prison for the charge of burglary, all sentences to be served consecutively. (T. 548-550).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. AS THE EIGHTH AMENDMENT ISSUE REGARDING THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT RAISED BELOW, THIS COURT SHOULD DECLINE TO CONSIDER THIS ISSUE.

In his first issue before this Court, Petitioner has complained of a portion of the prosecutor's argument, contending that it had the effect of diluting the sentencing jury's sense of responsibility and ultimately violated the Eighth Amendment under Caldwell v. Mississippi, 472 U.S. 320 (1985). A review of the brief filed on Petitioner's behalf on direct appeal (which is attached as Respondent's Exhibit A) shows that the specific portion of the prosecutor's argument now raised by Petitioner was not even challenged as error on direct appeal. See Respondent's Exhibit A, pp. 22-23. Moreover, a review of the enumeration of error attacking the propriety of the prosecutor's argument shows that any claim of error was raised as a matter of state law and there was no mention whatsoever of any Eighth Amendment or Caldwell issue. Thus, this Court should decline to review this issue as the federal question was neither raised below nor considered by the state appellate court.

Specifically, on Petitioner's direct appeal he challenged as error the following portion of the prosecutor's argument:

> Forgive him. I'll say to you, that's fine, but you don't have that right. I'll tell you who has that right to forgive. Kate Furlow has the right to forgive him. God has the right to forgive him. You don't.

(Trial Transcript 519; Respondent's Exhibit No. A, p. 22). Petitioner argued on appeal that the remark by the prosecutor

was improper because the jury could impose a life sentence despite finding the existence of any statutory aggravating circumstances. Id. Petitioner cited cases from the Georgia Supreme Court contending that the remark was error under state law. Id. at 22-23. Petitioner never contended that this or any other portion of the prosecutor's argument violated Caldwell. Id. The court decided this issue as a matter of state law. Lipham v. State, 257 Ga. at 812(6).

In the petition before this Court, Petitioner has complained of a different portion of the prosecutor's argument to contend that it diluted the jury's sense of responsibility under the Eighth Amendment and under Caldwell v. Mississippi, supra. Specifically, Petitioner complains before this Court of the following portion of the argument:

> And this is where, as the Judge said, you make the decision as to the punishment. But how did we get to right here? You got here because the district attorney, that's me, as the agent of the State made the decision to seek the death penalty in this case. Not any of you all but by law the only person who can do that. So you didn't bring us here. No one else did. That was my decision and that's why you can choose not to impose the death penalty if you want to, for any reason or no reason whatsoever. But that decision seeking the death penalty was already made. So don't feel like it is your and have it weigh too heavily on you because that was my decision.

(Trial Transcript 479). A review of Petitioner's direct appeal brief shows that this portion of the argument was not challenged as error nor was any Eighth Amendment or Caldwell issue raised. (Respondent's Exhibit No. A, pp. 22-23). Not

only was there no Eighth Amendment issue raised below, but the underlying portion of the prosecutor's argument allegedly giving rise to the Caldwell issue was not even raised nor decided on appeal. Thus, this issue presents nothing for review as it is well settled that this Court will not decide federal constitutional issues raised in this Court for the first time on review of a state court's decision. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Moore v. Illinois, 408 U.S. 786 (1972). This Court should decline to grant certiorari to consider this issue which was not raised below.

II. THIS COURT SHOULD DECLINE TO REVIEW PETITIONER'S CLAIM THAT THE SENTENCER FAILED TO CONSIDER MITIGATING EVIDENCE AS THIS ISSUE WAS NOT RAISED BELOW.

In his second certiorari question before this Court, Petitioner contends that the sentencing jury failed to "consider" evidence in mitigation so that his death sentence violates the Eighth and Fourteenth Amendments. Specifically, Petitioner contends that because he presented allegedly extensive evidence to the sentencing jury and the jury only deliberated as to sentence for approximately two hours, the jury must have failed to "consider" evidence in mitigation and has asked this Court to grant certiorari on what "consider" means. Again, this is an issue which was not even raised as error below. Thus, this Court should decline to consider this issue raised for the first time in the instant petition.

As shown in the attached brief, Petitioner raised as error on direct appeal claims that (1) the trial court impermissibly entered the attorney/client relationship by designating lead counsel; (2) the trial court erred in failing to direct a verdict of acquittal; (3) the trial court erred in failing to grant a change of venue; (4) the trial court erred in denying Petitioner's motion to sever the counts in the indictment; (5) the trial court erred in concluding the grand and traverse jury lists were constitutionally composed; and (6) the trial court erred in failing to declare a mistrial at sentencing based upon a specific portion of the prosecutor's argument. (Respondent's Exhibit No. A, p. 2). A perusal of this brief shows that at no time does Petitioner raise as error any claim that the sentencing jury simply did not deliberate long enough or fail to consider his evidence in mitigation prior to imposing a death sentence. Thus, not only was no Eighth or Fourteenth Amendment issue raised, but the underlying claim of error was

not even presented to the state appellate court. Petitioner has failed to show that any federal question was presented to and wrongly decided by the Georgia Supreme Court as to this issue. Thus, this Court should decline to grant certiorari as to this issue.

Respondent notes that Petitioner attempts to "bootstrap" a federal question by noting that part of the duty of the Supreme Court of Georgia on direct appeal is to conduct a proportionality review. Respondent notes, however, that this proportionality review is a function of Georgia's death penalty statute. Specifically, O.C.G.A. § 17-10-35(c)(3) provides that with regard to sentence, the Georgia Supreme Court shall determine whether the sentence of death "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Respondent acknowledges that in this case the state appellate court discharged its duty under the state statutory scheme to conduct a proportionality review, but the court did not conduct any such review under any Eighth Amendment claim. No where was any Eighth or Fourteenth Amendment issue presented to the state appellate court, nor was Petitioner's underlying claim of error about any failure to consider mitigating evidence even raised. Thus, for this additional reason, Respondent submits that this Court should decline to grant certiorari as to this issue. Cardinale v. Louisiana, supra; Moore v. Illinois, supra.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that the federal questions presented to this Court for review were never presented to the court below and, further, the decision sought to be reviewed is demonstrably in accord with any applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PAULA K. SMITH, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition by depositing a copy of same in the United States mail, with sufficient postage affixed on and addressed to:

Ursula Bentele
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This 20th day of June, 1988.

Paula K. Smith
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